

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220794; B-220795 **DATE:** February 20, 1986
MATTER OF: Beckman Instruments, Inc.

DIGEST:

1. A protester challenging whether the awardee's equipment meets the agency's needs is not an "interested party" under GAO's Bid Protest Regulations, and its protest is therefore dismissed, where even if its protest were upheld it would not be in line for award because (1) the protester's bid is nonresponsive as the result of its inclusion of a standard commercial quotation form containing terms and conditions conflicting with the government's solicitation and (2) because there are two, lower priced bids which have not been protested.
2. Where initial protest letter sets forth one basis for protest but is followed more than 6 weeks later by letters which indicate that real basis for protest is an entirely different one than that which was stated in initial protest letter, and where real basis of protest was known to protester when initial protest was filed, protest is untimely.

On October 15, 1985, Beckman Instruments, Inc., simultaneously filed with our Office two protests concerning two procurements of chemical analyzers by the Veterans Administration Medical Center (VA), Miami, Florida.

With regard to invitation for bids (IFB) No. 546-34-85 ("IFB-34"), Beckman protested the award to the "vendor chosen" on the ground that its equipment did not meet a specification requirement (our B-220795). With regard to IFB No. 546-42-85 ("IFB-42"), Beckman protested the award to "a competitor . . . on the ground that the awardee offered a price below their GSA [General Services Administration] contract" (our B-220794).

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An unusual threshold question with which we are confronted is whether each of Beckman's protests actually is directed to the procurement identified in it.

The Beckman protests concern two contemporaneous brand-name-or-equal procurements by the same hospital of the same type of equipment under similar specifications. Beckman's initial protests were brief, did not identify either awardee by name, referred to almost no facts unique to either procurement and did not accurately quote the one specification provision at issue. Nevertheless, when filed, each appeared to articulate, albeit minimally, a basis for protest.

In its reports to our Office, the VA stated that Beckman must have inadvertently transposed the solicitation numbers in its protests because the issue Beckman raised concerning IFB-42 actually concerned IFB-34, and vice versa. The VA undertook to "correct Beckman's error" and responded to Beckman's allegations accordingly. Beckman, however, denies that it erred. We have examined the record very closely in this regard and find some support in it for each party's position.

Beckman initially protested the award made under IFB-34 on the ground that the equipment offered by the awardee "does not meet the specifications of the bid which require an 'on-line computer to be capable of tightening^{1/} with the instrument Astra 8 in use in the laboratory.'" Although this is not an accurate quotation of the specification in IFB-34, it does resemble the language of that solicitation more closely than it does the comparable specification provision in IFB-42. We think it appropriate, therefore, to accept Beckman's position that its protest concerning IFB-34 did, in fact, concern that solicitation.

Beckman's initial basis for protest under IFB-42, on the other hand--that the "awardee offered a price below their GSA contract"---appears either to have been based on a misunderstanding of the circumstances of that procurement or, as the VA contends, was a possible reference to IFB-34, since the equipment covered by the latter solicitation eventually was obtained through a GSA Federal Supply Schedule (FSS) contract. Beckman, however, has never asserted that it intended this ground for protest to apply

^{1/} Beckman later advised "tightening" should have read "tie-in."

to IFB-34.^{2/} In later letters to our Office "clarifying" its protest of IFB-42, Beckman states that its "principal objection . . . is the method used to obtain price clarification from the awardee after bid opening" and "we should have said that the awardee offered a price after the bid opening, and this was not in accordance with the recorded price." This is not a "clarification," but a new ground for protest entirely separate from that which Beckman initially presented to our Office.

For the reasons which follow, we dismiss both protests.

IFB-34 was issued on June 24, 1985, for the supply of one "chemical analyzer, Beckman Astra Ideal, or equal, with computer interface" and two service data manuals. One specification requirement was that the "on-line computer shall be capable of tie-in with ASTRA 8's [other Beckman-brand chemical analyzers] currently in use."

Six responses to the solicitation were received and were opened on August 13, 1985. One response was a "no bid"; Beckman's price was the highest of the remaining bidders. The VA rejected the low bid as nonresponsive for failure to meet the computer interface requirement; the agency considered the four remaining bids to be responsive. During the evaluation of those bids, the VA states, it became aware that the equipment offered by the second low bidder, Eastman Kodak Company, was on a mandatory GSA FSS contract. The agency states that it, therefore, made no award under the solicitation, but issued a purchase order to Eastman Kodak under its GSA contract. Delivery of the equipment has been suspended pending our resolution of Beckman's protest.

As we indicated above, Beckman's basis for protest is that the Eastman Kodak equipment allegedly does not include a feature needed to satisfy the VA's need. The VA disagrees and, in addition, argues that Beckman's protest should be dismissed because it would not be in line for award even if Eastman Kodak was removed from consideration. In this regard, the VA notes that Beckman is the highest bidder and there remain two responsive, lower priced bidders whose bids it has not protested. We think there is merit to the VA's position.

^{2/} It would be factually incorrect even if it did: Kodak's bid price for the Item 1 equipment under IFB-34 was the same as the amount of the purchase order the VA issued to it pursuant to its GSA FSS contract.

In addition, although the point was not raised by the agency, we note that Beckman's bid was nonresponsive and therefore not eligible for award regardless of its standing among the bidders. Beckman attached to its bid, immediately following the IFB Schedule, its standard commercial quotation form, addressed to the VA Medical Center, signed by the same person who signed Beckman's bid and containing a description of what Beckman proposed to supply and its price. On the face of this form the following statements appear:

"This proposal is subject to buyer's acceptance of the terms and conditions of sale appearing on the reverse side hereof."

"This proposal is made contingent upon the acceptance by Buyer without change or modification of the provisions of this proposal including all insertions on the face hereof and of the terms and conditions of sale on the reverse side hereof. Unless specifically accepted by Beckman in writing contrary or additional terms or conditions or changes in specifications imposed by Buyer's Purchase Order (if any) or otherwise shall not bind Beckman. Issuance of Buyer's Purchase Order against this quotation (or the acceptance of the products or any part thereof offered hereby) shall be deemed an unqualified acceptance of the provisions of this quotation including the terms and conditions of sale on the reverse hereof. Upon any acceptance of this quotation it shall contain the entire agreement between Buyer and Beckman and shall supersede all prior representations, promises or conditions written or oral in connection herewith not expressly included herein."

The "Terms and Conditions of Sale" on the reverse of Beckman's quotation form differ in a number of material respects from those of IFB-34. For example, under the quotation form, shipments were to be insured and the expense paid by the buyer; the buyer would be obligated to pay contract cancellation or termination charges as "invoiced by Beckman;" the delivery date was only Beckman's "best estimate" and Beckman assumed no liability for delay; and federal, state and local taxes were to be paid by the buyer. In addition, the provisions concerning passage of

title and risk of loss, and guarantee terms, also differed. We do not believe these conflicts in terms and conditions are obviated by the "U.S. Government Contracts" clause of Beckman's quotation form, which is directed to requirements made applicable to subcontracts by federal statute. A bid which contains standard commercial terms and conditions which deviate from material solicitation requirements must be rejected as nonresponsive. Fluke Trendar Corp., B-196071, Mar. 13, 1980, 80-1 C.P.D. ¶ 196.

Under our Bid Protest Regulations, a party must be "interested" before we will consider its protest. 4 C.F.R. § 21.1(a) (1985). A party is not "interested" if it would not be in line for award should its protest be upheld. Central Air Service, Inc., B-218833.2, May 21, 1985, 85-1 C.P.D. ¶ 580. Since Beckman's bid is nonresponsive and, even if it were not, there are two other, lower bidders whose bids Beckman has not protested, Beckman would not be in line for award of this contract even if Eastman Kodak was eliminated from consideration. Beckman is therefore not an interested party and its protest as to IFB-34 is dismissed.

IFB-42 was issued on August 16, 1985, for two chemical analyzers, instructions, schematics and operator training. The IFB specifications described this equipment as "chemistry analyzer with computer interface. . . . The system must be categorized as a 24 hour STAT/Routine analyzer capable of tie-in with other Beckman Analyzer(s)."

With regard to the analyzer equipment, the bid Schedule as completed by the awardee, Allied Instrumentation Laboratory, appeared as follows:

SECTION B - SUPPLIES OR SERVICES AND PRICES/COSTS

- | | |
|---|--------------------------|
| 1. Chemical analyzer,
Beckman Astra 8,
or equal, #668000,
with computer
interface . . . | 2 ea <u>\$135,000.00</u> |
|---|--------------------------|

There were three other bidders, of which Beckman was one. On its bid form, Beckman entered with regard to Item No. 1:

"100,500.00 each
LESS 8,000.00

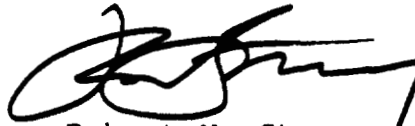
 92,500.00 each"

Beckman's agent present at the bid opening questioned what Allied's bid of \$135,000 represented, i.e., whether it was the price per analyzer or the total price for two analyzers. The contracting officer did not answer that question but replied that a "clarification" would be obtained from Allied. According to the contracting officer's statement filed with our Office, later on the day of bid opening she telephoned Allied's employee who had signed its bid, asked for "price verification," and was told that the price of \$135,000 was "per each." On this basis, Allied's bid was high and Beckman's was low. Early the next morning, however, a sales representative for Allied called the VA and advised that the price of the analyzers was \$67,500 each for a total of \$135,000 for both systems. Thus computed, Allied's bid was low. Allied verified its unit price of \$67,500 by telegram, upon receipt of which the VA made award to it. Performance of the contract has been suspended pending resolution of Beckman's protest.

Beckman's protest under IFB-42 is untimely. As previously indicated, Beckman's initial protest, filed in our Office on October 15, 1985, alleged as a basis for protest only that the "awardee offered a price below their GSA contract." In letters dated December 2 and 10 (filed in our Office on December 4 and 12, respectively), Beckman indicated that it had incorrectly stated the basis for protest in its initial letter and that its real basis for protest was that the contracting agency had allowed the awardee to clarify its bid after bid opening. In essence, while Beckman knew this basis for protest at the time of bid opening, or at the latest upon its receipt of the agency's notification of award, Beckman did not file its true basis for protest in our Office until December 4, at the earliest. Timeliness of the protest must be measured from the date of receipt by our Office of the detailed statement of the factual and legal grounds upon which the protest is based. 4 C.F.R. § 21.1(c)(4) (1985); see also Dynalelectron Corp., B-219664, Dec. 6, 1985, 65 Comp. Gen. , 85-2 C.P.D. ¶ 634; A&M Instrument, Inc.--Request for Reconsideration, B-220167.2, Sept. 30, 1985, 85-2 C.P.D. ¶ 359. Our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues.

See Dynalectron Corp., 65 Comp. Gen. ___, 85-2 C.P.D. ¶ 634. Since the true basis for protest was not filed in our Office until more than 6 weeks after the initial protest was filed, this protest is also for dismissal. In any event, we do not find unreasonable the VA's view that Allied intended to provide both analyzers for a combined total of \$135,000; the record does not support a finding that Allied had originally intended a per unit price of \$135,000 (or a total price of \$270,000 for both units) but was willing to reduce its price by \$135,000 to get the award on a contract of this relatively small amount.

Accordingly, both protests are dismissed.

A handwritten signature in black ink, appearing to read 'R. Strong', with a large, stylized flourish extending from the end of the signature.

Robert M. Strong
Deputy Associate General Counsel